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Copyright Royalty Board

37 CFR Part 380

[Docket No. 19-CRB-0005-WR (2021-2025) (Web V)]

Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings (Web V)

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Proposed rule related to public broadcasters (radio).

SUMMARY: The Copyright Royalty Judges are publishing for comment proposed regulations governing the rates and terms for the digital performances of sound recordings by certain public radio stations and for the making of ephemeral recordings necessary to facilitate those transmissions for the period commencing January 1, 2021, and ending on December 31, 2025.

DATES: Comments and objections, if any, are due no later than [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments and proposals, identified by docket number 19-CRB-0005-WR (2021-2025), by any of the following methods:

CRB's electronic filing application: Submit comments and proposals online in eCRB at <https://app.crb.gov/>.

U.S. mail: Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977; or

Overnight service (only USPS Express Mail is acceptable): Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977; or

Commercial courier: **Address** package to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM-403, 101 Independence Avenue SE, Washington, DC 20559-6000. **Deliver to:** Congressional Courier Acceptance Site, 2nd Street NE and D Street NE, Washington, DC; or

Hand delivery: Library of Congress, James Madison Memorial Building, LM-401, 101 Independence Avenue SE, Washington, DC 20559-6000.

Instructions: Parties unable to use eCRB must submit an original, two paper copies, and an electronic version on a CD. All submissions must include a reference to the Copyright Royalty Board name and docket number (19-CRB-0005-WR (2021-2025)), as well as the *Federal Register* citation for this proposed rule. All submissions will be posted without change to eCRB at <https://app.crb.gov/> including any personal information provided.

Docket: For access to the docket to read submitted background documents or comments, go to eCRB, the Copyright Royalty Board’s electronic filing and case management system, at <https://app.crb.gov/> and search for docket number 19-CRB-0005-WR (2021-2025).

FOR FURTHER INFORMATION CONTACT: Anita Blaine, Program Specialist, by telephone at (202) 707-0078 or e-mail at crb@loc.gov.

SUPPLEMENTARY INFORMATION: On September 23, 2019, the Copyright Royalty Judges (Judges) received a joint motion from SoundExchange, Inc. (“SoundExchange”), National Public Radio, Inc. (“NPR”), and the Corporation for Public Broadcasting (“CPB”) (together, the “Settling Parties”) to adopt a partial settlement of

their interests related to Web V royalty rates and terms for 2021-2025¹ for certain internet transmissions by public broadcasters, NPR, American Public Media, Public Radio International, Public Radio Exchange, and certain other unnamed public radio stations. Joint Motion to Adopt Partial Settlement, Docket No. 19-CRB-0005-WR (2021-2025). Their interests concern the rule setting minimum copyright royalty fees and terms that the Judges will establish for compulsory copyright licenses for certain internet transmissions of sound recordings by public radio stations for the period from January 1, 2021, through December 31, 2025. SoundExchange, Inc. represents the interests of sound recording copyright owners and performers. The public broadcaster parties are users of the copyrighted material, and CPB provides significant funding for those parties. CPB is the entity that will pay the royalties pursuant to the settlement. The Judges hereby publish the agreed proposal and request comments from the public.

Section 114 of the Copyright Act, title 17 of the United States Code, provides a statutory license that allows for the public performance of sound recordings by means of a digital audio transmission by, among others, eligible nonsubscription transmission services. 17 U.S.C. 114(f). For purposes of the section 114 license, an “eligible nonsubscription transmission” is a noninteractive digital audio transmission that does not require a subscription for receiving the transmission. The transmission must also be made as part of a service that provides audio programming consisting in whole or in part of performances of sound recordings the purpose of which is to provide audio or other

¹ Web V is short for Webcasting V. This proceeding is the fifth since Congress enacted the compulsory sound recording performance license for webcasting.

entertainment programming, but not to sell, advertise, or promote particular goods or services. *See* 17 U.S.C. 114(j)(6).

Services using the section 114 license may need to make one or more temporary or “ephemeral” copies of a sound recording to facilitate the transmission of that recording. The section 112 statutory license allows for the making of the necessary ephemeral reproductions. 17 U.S.C. 112(e).

Chapter 8 of the Copyright Act requires the Judges to conduct proceedings every five years to determine the rates and terms for the sections 114 and 112 statutory licenses. 17 U.S.C. 801(b)(1), 804(b)(3)(A). The current proceeding commenced in January 2019 for rates and terms that will become effective on January 1, 2021, and end on December 31, 2025. Pursuant to section 804(b)(3)(A), the Judges published in the *Federal Register* a notice commencing the proceeding and requesting that interested parties submit their petitions to participate. 84 FR 359 (Jan. 24, 2019). NPR² and SoundExchange each submitted petitions to participate, as did other parties.

On September 23, 2019, the Settling Parties submitted to the Judges a joint motion to adopt a partial settlement of their interests in the proceeding. The parties requested that the Judges “endeavor to determine before the deadline for the filing of written rebuttal statements in this Proceeding (January 10, 2020) whether they will adopt the settlement.” Joint Motion at 1.

Statutory Timing of Adoption of Rates and Terms

Section 801(b)(7)(A) of the Copyright Act authorizes the Judges to adopt royalty rates and terms negotiated by “some or all of the participants in a proceeding at any time

² NPR is participating on behalf of itself, its member and affiliated stations, and all public radio stations and entities eligible to receive funding from CPB. NPR Petition to Participate at 1 (Feb. 4, 2019).

during the proceeding” provided they are submitted to the Judges for approval. The Judges must provide “an opportunity to comment on the agreement” to participants and non-participants in the rate proceeding who “would be bound by the terms, rates, or other determination set by any agreement....” 17 U.S.C. 801(b)(7)(A)(i). Participants in the proceeding may also “object to [the agreement’s] adoption as a basis for statutory terms and rates.” *Id.*

The Judges “may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement,” only “if any participant [in the proceeding] objects to the agreement and the [Judges] conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates.” 17 U.S.C. 801(b)(7)(A)(ii).

Proposed Adjustments to Rates and Terms

The Settlement continues the structure of previous settlements between the parties, while increasing the payment to be made by CPB. Joint Motion at 2. Because the Settlement applies to only a closed group of licensees, and has only a single payor (CPB), the Settlement is being submitted to the Judges for adoption as a statutory rate and terms only so that it will be binding on all artists and copyright owners, including those that are not members of SoundExchange. Joint Motion at 2-3. The parties have agreed to continue their prior reporting arrangements but have not included the details of those arrangements in the Settlement, which, they believe, is consistent with guidance that the Judges have provided. Joint Motion at 3 and n.1. The parties have styled their proposed regulations as a replacement subpart D to appear in the Judges’ regulations at 37 CFR part 380 and have set forth in proposed new subpart D only regulatory provisions specific

to Public Broadcasters, on the assumption that the generally applicable provisions in subpart A will apply to Public Broadcasters to the extent consistent with subpart D. Joint Motion at 6, Attachment A.

The public may comment and object to any or all of the proposed regulations contained in this document. Such comments and objections must be submitted no later than [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

List of Subjects in 37 CFR Part 380

Copyright, Sound recordings, Webcasters.

For the reasons set forth in the preamble, the Copyright Royalty Judges propose to amend 37 CFR part 380 as follows:

PART 380—RATES AND TERMS FOR TRANSMISSIONS BY ELIGIBLE NONSUBSCRIPTION SERVICES AND NEW SUBSCRIPTION SERVICES AND FOR THE MAKING OF EPHEMERAL REPRODUCTIONS TO FACILITATE THOSE TRANSMISSIONS

1. The authority citation for part 380 continues to read as follows:

Authority: 17 U.S.C. 112(e), 114(f), 804(b)(3).

2. Revise subpart D to read as follows:

Subpart D—Public Broadcasters

Sec.

380.30 Definitions.

380.31 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

380.32 Terms for making payment of royalty fees and statements of account.

§ 380.30 Definitions.

For purposes of this subpart, the following definitions apply:

Authorized Website is any Website operated by or on behalf of any Public Broadcaster that is accessed by Website Users through a Uniform Resource Locator (“URL”) owned by such Public Broadcaster and through which Website Performances are made by such Public Broadcaster.

CPB is the Corporation for Public Broadcasting.

Music ATH is aggregate tuning hours of Website Performances of sound recordings of musical works.

NPR is National Public Radio, Inc.

Originating Public Radio Station is a noncommercial terrestrial radio broadcast station that—

(1) Is licensed as such by the Federal Communications Commission;

(2) Originates programming and is not solely a repeater station;

(3) Is a member or affiliate of NPR, American Public Media, Public Radio International, or Public Radio Exchange, a member of the National Federation of Community Broadcasters, or another public radio station that is qualified to receive funding from CPB pursuant to its criteria;

(4) Qualifies as a “noncommercial webcaster” under 17 U.S.C. 114(f)(4)(E)(i);
and

(5) Either—

(i) Offers Website Performances only as part of the mission that entitles it to be exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501); or

(ii) In the case of a governmental entity (including a Native American Tribal governmental entity), is operated exclusively for public purposes.

Person is a natural person, a corporation, a limited liability company, a partnership, a trust, a joint venture, any governmental authority or any other entity or organization.

Public Broadcasters are NPR, American Public Media, Public Radio International, and Public Radio Exchange, and up to 530 Originating Public Radio Stations as named by CPB. CPB shall notify SoundExchange annually of the eligible Originating Public Radio Stations to be considered Public Broadcasters per this definition (subject to the numerical limitations set forth in this definition). The number of Originating Public Radio Stations treated per this definition as Public Broadcasters shall not exceed 530 for a given year without SoundExchange's express written approval, except that CPB shall have the option to increase the number of Originating Public Radio Stations that may be considered Public Broadcasters as provided in § 380.31(c).

Side Channel is any Internet-only program available on an Authorized Website or an archived program on such Authorized Website that, in either case, conforms to all applicable requirements under 17 U.S.C. 114.

Term is the period January 1, 2021, through December 31, 2025.

Website is a site located on the World Wide Web that can be located by a Website User through a principal URL.

Website Performances are all public performances by means of digital audio transmissions of sound recordings, including the transmission of any portion of any sound recording, made through an Authorized Website in accordance with all

requirements of 17 U.S.C. 114, from servers used by a Public Broadcaster (provided that the Public Broadcaster controls the content of all materials transmitted by the server), or by a contractor authorized pursuant to § 380.31(f), that consist of either the retransmission of a Public Broadcaster's over-the-air terrestrial radio programming or the digital transmission of nonsubscription Side Channels that are programmed and controlled by the Public Broadcaster; provided, however, that a Public Broadcaster may limit access to an Authorized Website, or a portion thereof, or any content made available thereon or functionality thereof, solely to Website Users who are contributing members of a Public Broadcaster. This term does not include digital audio transmissions made by any other means.

Website Users are all those who access or receive Website Performances or who access any Authorized Website.

§ 380.31 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) *Royalty rates.* The total license fee for all Website Performances by Public Broadcasters during each year of the Term, up to the total Music ATH set forth in paragraphs (a)(1) through (5) of this section for the relevant calendar year, and Ephemeral Recordings made by Public Broadcasters solely to facilitate such Website Performances, shall be \$800,000 (the "License Fee"), unless additional payments are required as described in paragraph (c) of this section. The total Music ATH limits are:

(1) 2021: 360,000,000;

(2) 2022: 370,000,000;

(3) 2023: 380,000,000;

(4) 2024: 390,000,000; and

(5) 2025: 400,000,000.

(b) *Calculation of License Fee.* It is understood that the License Fee includes:

(1) An annual minimum fee for each Public Broadcaster for each year during the Term;

(2) Additional usage fees for certain Public Broadcasters; and

(3) A discount that reflects the administrative convenience to the Collective (for purposes of this subpart, the term “Collective” refers to SoundExchange, Inc.) of receiving annual lump sum payments that cover a large number of separate entities, as well as the protection from bad debt that arises from being paid in advance.

(c) *Increase in Public Broadcasters.* If the total number of Originating Public Radio Stations that wish to make Website Performances in any calendar year exceeds the number of such Originating Public Radio Stations considered Public Broadcasters in the relevant year, and the excess Originating Public Radio Stations do not wish to pay royalties for such Website Performances apart from this subpart, CPB may elect by written notice to the Collective to increase the number of Originating Public Radio Stations considered Public Broadcasters in the relevant year effective as of the date of the notice. To the extent of any such elections, CPB shall make an additional payment to the Collective for each calendar year or part thereof it elects to have an additional Originating Public Radio Station considered a Public Broadcaster, in the amount of the annual minimum fee applicable to Noncommercial Webcasters under subpart B of this part for each additional Originating Public Radio Station per year. Such payment shall

accompany the notice electing to have an additional Originating Public Radio Station considered a Public Broadcaster.

(d) *Allocation between ephemeral recordings and performance royalty fees.* The Collective must credit 5% of all royalty payments as payment for Ephemeral Recordings and credit the remaining 95% to section 114 royalties. All Ephemeral Recordings that a Licensee makes which are necessary and commercially reasonable for making noninteractive digital transmissions are included in the 5%.

(e) *Effect of non-performance by any Public Broadcaster.* In the event that any Public Broadcaster violates any of the material provisions of 17 U.S.C. 112(e) or 114 or this subpart that it is required to perform, the remedies of the Collective shall be specific to that Public Broadcaster only, and shall include, without limitation, termination of that Public Broadcaster's right to be treated as a Public Broadcaster per this paragraph (e) upon written notice to CPB. The Collective and Copyright Owners also shall have whatever rights may be available to them against that Public Broadcaster under applicable law. The Collective's remedies for such a breach or failure by an individual Public Broadcaster shall not include termination of the rights of other Public Broadcasters to be treated as Public Broadcasters per this paragraph (e), except that if CPB fails to pay the License Fee or otherwise fails to perform any of the material provisions of this subpart, or such a breach or failure by a Public Broadcaster results from CPB's inducement, and CPB does not cure such breach or failure within 30 days after receiving notice thereof from the Collective, then the Collective may terminate the right of all Public Broadcasters to be treated as Public Broadcasters per this paragraph (e) upon written notice to CPB. In such a case, a prorated portion of the License Fee for the

remainder of the Term (to the extent paid by CPB) shall, after deduction of any damages payable to the Collective by virtue of the breach or failure, be credited to statutory royalty obligations of Public Broadcasters to the Collective for the Term as specified by CPB.

(f) *Use of contractors.* The right to rely on this subpart is limited to Public Broadcasters, except that a Public Broadcaster may employ the services of a third Person to provide the technical services and equipment necessary to deliver Website Performances on behalf of such Public Broadcaster, but only through an Authorized Website. Any agreement between a Public Broadcaster and any third Person for such services shall:

(1) Obligate such third Person to provide all such services in accordance with all applicable provisions of the statutory licenses and this subpart;

(2) Specify that such third Person shall have no right to make Website Performances or any other performances or Ephemeral Recordings on its own behalf or on behalf of any Person or entity other than a Public Broadcaster through the Public Broadcaster's Authorized Website by virtue of its services for the Public Broadcaster, including in the case of Ephemeral Recordings, pre-encoding or otherwise establishing a library of sound recordings that it offers to a Public Broadcaster or others for purposes of making performances, but instead must obtain all necessary licenses from the Collective, the copyright owner or another duly authorized Person, as the case may be;

(3) Specify that such third Person shall have no right to grant any sublicenses under the statutory licenses; and

(4) Provide that the Collective is an intended third-party beneficiary of all such obligations with the right to enforce a breach thereof against such third Person.

§ 380.32 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* CPB shall pay the License Fee to the Collective in five equal installments of \$800,000 each, which shall be due December 31, 2020, and annually thereafter through December 31, 2024.

(b) *Reporting.* CPB and Public Broadcasters shall submit reports of use and other information concerning Website Performances as agreed upon with the Collective.

(c) *Terms in general.* Subject to the provisions of this subpart, terms governing late fees, distribution of royalties by the Collective, unclaimed funds, record retention requirements, treatment of Licensees' confidential information, audit of royalty payments and distributions, and any definitions for applicable terms not defined in this subpart shall be those set forth in subpart A of this part.

Dated: October 23, 2019.

Jesse M. Feder
Chief Copyright Royalty Judge
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